BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KHANH VAN VO Claimant	)	
VS.	)	Docket No. 1,034,922
DOLD FOODS, LLC Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 30, 2010, Award of Review & Modification entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 17, 2010. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. Joe Seiwert, of Wichita, Kansas, appeared for claimant. Douglas D. Johnson, of Wichita, Kansas, appeared for respondent.

On August 18, 2008, the Administrative Law Judge (ALJ) entered an Award[1] and granted claimant benefits under Docket No. 1,034,922, for a 5 percent whole body functional impairment for injuries to claimant's neck. The ALJ denied claimant's request for a work disability after determining claimant had been terminated for cause. Claimant appealed the Award to the Board, which, in a January 30, 2009, Order, affirmed the ALJ's Award in this claim. The Board's Order was not appealed to the Kansas Court of Appeals.

On October 12, 2009, claimant filed an application for review and modification. In the September 30, 2010, Award of Review & Modification, the ALJ found the doctrine of res judicata applied and claimant was not entitled to an increase in benefits in this claim. Claimant then appealed the review and modification Award to the Board.

[1] The August 18, 2008, Award was entered under two docket numbers – 1,030,874 (bilateral upper extremity injuries) and 1,034,922 (neck injuries). This review and modification proceeding and appeal involve only Docket No. 1,034,922.

The Board has considered the record listed in the Award of Review & Modification. The parties have agreed that the record also contains the record as listed in the prior Award, which was issued in Docket Nos. 1,030,874 and 1,034,922.

ISSUES

Claimant contends he is entitled to modification of his award. He argues the previous determination of termination for cause has no bearing on the present application for review and modification and points to the literal statutory interpretation applied in the *Bergstrom*[2] decision that there is no requirement that workers demonstrate a good faith effort in maintaining or seeking post-injury employment. Claimant also contends that his continued inability to find work after his injuries and termination (except for work that lasted approximately one month) is a change in circumstances for purposes of review and modification. Claimant argues that in light of *Bergstrom,* his award is inadequate as it fails to award work disability when he has not returned to work at 90 percent of his pre-injury average weekly wage. Claimant requests benefits for a 70 percent work disability based upon a 40 percent task loss and a 100 percent wage loss.

Respondent maintains the Award of Review & Modification denying an increase in benefits should be affirmed. It argues no relevant factors have changed and the only "change" is the issuance of the *Bergstrom* decision by the Kansas Supreme Court. Respondent points to the recent Kansas Court of Appeals decision in *Scheidt*,[3] which held that issues decided in determining an award may not be litigated again unless specifically provided for by statute, and argues K.S.A. 44-528 does not specifically provide for modification on the basis of change in case law alone. Respondent also contends the record in this review and modification proceeding contains no evidence that the existing award is inadequate.

The issues for the Board's review are:

(1) Is claimant entitled to modification of his award?

(2) If so, what is the nature and extent of claimant's disability?

PRINCIPLES OF LAW

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. K.S.A. 44-528 provides in part:

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[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[3] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009), *rev. denied* ___ Kan. ___ (2010).

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Review and modification, however, is not available to relitigate all issues. In *Randall*,[4] the Kansas Supreme Court held that res judicata applies to foreclose "a finding of a past fact which existed at the time of the original hearing."

> This is not necessarily true of findings relating to the extent of claimant's disability. The extent of a claimant's disability resulting from an accidental injury, where the causal connection is established, at any given time must be based on evidence of the claimant's condition at that particular time.[5]

In *Morris*,[6] the Kansas Court of Appeals stated:

> There is no doubt . . . that the purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition. [Citations omitted.]

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[4] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973).

[5] *Id.* at 396-97.

[6] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979)

In *Gile*,[7] the Kansas Supreme Court stated:

> Any modification is based on the existence of new facts, a changed condition of the workman's capacity, which renders the former award either excessive or inadequate [citation omitted]. The burden of proving the changed condition of the claimant is upon the party asserting it. [Citation omitted.]

In *Collier*,[8] the Kansas Supreme Court stated:

> The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:
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> > "The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."
> > . . . .
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> The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

In *Finical*,[9] the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

In *Scheidt*,[10] the Kansas Court of Appeals stated: "[T]he statute [K.S.A. 44-528(a)] provides for modification when an employee's functional impairment or work disability has changed but says nothing about modifying an award when caselaw changes."

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[7] *Gile v. Associated Co.*, 223 Kan. 739, 740-41, 576 P.2d 663 (1978).

[8] *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998).

[9] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

[10] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 261, 211 P.3d 175 (2009), *rev. denied* ___ Kan. ___ (2010).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The post-award additions to the record consist of the testimony of claimant and the expert opinion testimony of two physicians, Dr. Paul Stein and Dr. Pedro Murati. Claimant believes his symptoms have worsened, but the medical evidence shows no significant changes have occurred in claimant's condition. Dr. Stein opined that claimant's percentage of functional impairment is unchanged. Dr. Stein further opined that claimant needs no new or additional restrictions. Whereas Dr. Murati originally said claimant should use common sense, he now delineated his restrictions as no climbing ladders, no crawling, no performing above-shoulder-level work with his right, and no work more than 24 inches from the body on the right. Dr. Murati also restricted claimant's lifting to 35 pounds occasionally, 20 pounds frequently and 10 pounds constantly, and said that claimant should avoid awkward positions of the neck. However, his task loss opinion remains the same.

Claimant admits:

> In Docket No. 1034922, both Dr. Murati and Dr. Stein agreed that claimant had a 5% functional impairment to the neck. They differed and continue to differ on the cause of this injury, but for the purposes of this case it is *res judicata* that claimant suffered a 5% cervical injury to his neck that was caused by his work injury.[11]

The Board finds that claimant's physical condition has not changed since the original Award.

Turning now to the question of whether a wage can be imputed to claimant based upon a lack of good faith, the Board concludes that finding is now the law of this case. Although the case law has changed such that good faith is no longer a valid consideration for purposes of determining a claimant's entitlement to work disability, a change in case law is not a basis for modification of claimant's permanent partial disability award. Claimant did not appeal the original award which denied him work disability based upon a finding of lack of good faith. Therefore, the finding of no wage loss based upon circumstances surrounding claimant's termination from his employment with respondent is the law of the case. Claimant's post-award request for a modification of that determination is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Review & Modification entered by Administrative Law Judge John D. Clark dated September 30, 2010, is affirmed.

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[11] Claimant's Brief at 4 (filed Nov. 8, 2010).

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joe Seiwert, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent
John D. Clark, Administrative Law Judge